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COUNTERSTATEMENT OF THE CASE<sup>1</sup>

On August 7, 1981 at approximately 10:40 p.m., Randall Todd, a clerk at the Keg Liquor Store in Louisville, Kentucky, was found shot to death. (TE Vol. II, 9). The police suspected that he had been shot during the course of a robbery, but found that no money had been taken from the store. (TE IV, 54). An extensive search of the liquor store and the area immediately surrounding it were made but the police were unable to find much physical evidence beyond several fingerprints, a footprint and some tire tracks. (TE II, 12, 31-33). None of this evidence indicated the identity of the person(s) involved. As a result of an autopsy, the police recovered a single .32 caliber bullet from the body of Mr. Todd. (TE II, 5). However, the bullet was damaged to the point that the state firearm's examiner could not determine anything except the caliber of the bullet and the types of pistols from which it could have been fired. (TE II, 62-65). No other physical evidence was discovered and at this point the police had no suspect in the crime. The respondent became involved in the case only after he was arrested on an unrelated charge.

On August 14, 1981, a juvenile named Patrick Holder was arrested in connection with a service station burglary on the previous evening. He named the respondent as an accomplice to the burglary. (TE Supp. 7). Holder and Detective Burbrink went to the scene of the burglary and on their way back to a police substation,

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<sup>1</sup> References to the state court record are made (TR \_\_\_\_). References to the transcript of the suppression hearing are made (TE Supp. \_\_\_\_). References to the state trial transcript are made to volume and page number, e.g. (TE I, \_\_\_\_). References to the certiorari petition are made (Pet. for Cert. \_\_\_\_).

Holder saw the respondent. Burbrink then arrested the respondent on the burglary charge and took him to the police substation. (TE Supp. 7-9).

While completing the paperwork incident to the burglary arrest, Burbrink was sitting at a desk with the respondent and, according to Burbrink, (TE Supp. 10):

[J]ust out of the clear blue sky, [the respondent] said, "I confess." He said, "I confess". I said, "Confess to what?" He said, "I confess to robbing the hardware store out there on Dixie Highway next to the Convenient." I kind of just looked at him and I really didn't pay him too much mind. He said, "I confess to shooting the police officer." He said, "I shot that police officer out there." He said, "I think I shot him in the face." I said, "What are you talking about?" He said, "Out there off Dixie Highway, I shot that police officer." He said, "Right before that, we robbed them people over at the bowling alley." I said, "Over at Big A?" He said, "Yeah, at Big A."

The police subsequently learned that the respondent was not involved in the shooting (TE Supp. 18-19) and that he was lying about the hardware store robbery. (TE Supp. 14). However, he denied knowing anything about the shooting at the Keg Liquor Store. (TE Supp. 11).

The respondent was taken to the Juvenile Detention Center where the police intended to take a tape recorded statement about the hardware store robbery. He arrived at the Center at about 7:00 p.m. and the statement began at 7:45 p.m. (TE Supp. 13). While the respondent was talking about the purported robbery of the hardware store, he said that the clerk set off an alarm and when that happened, the respondent fired a shot into the air. When

the police informed him that nobody was shot during the robbery of the hardware store, the respondent stated, "No I am talking about the Keg Liquors. That is where I am talking about is at Keg Liquors where that guy got killed." (TE Supp. 14). At that point, the police taped a statement from respondent in which he implicated himself in an attempted robbery of the liquor store and in shooting the clerk. (TE Supp. 14). The resulting confession was introduced as evidence during the trial. (TE II, 14-30).

Many of the statements made by the respondent in the tape recorded interview were contradicted by facts discovered by police during the course of their investigation. The story, as it was told in the statement, was that the respondent and another juvenile saw a robbery occur at the Algonquin Manor Shopping Center. The respondent decided to go home and get his guns in order to commit a robbery. (TE II, 15-16). On the way, he met his uncle, George Howard Williams, who planned a robbery in which Williams would pretend to make a purchase and the respondent would enter the establishment and announce a robbery. (TE II, 16). When the respondent announced the robbery, he said the clerk looked like he had set off an alarm and then "sirens and stuff started going." The respondent then fired a shot into the air and ran out of the store. (TE II, 16-20, 25). He said that before he fired the shot, the clerk gave him between \$300 and \$400 from the cash register and "a little box under the cash register where you pull the drawer out." The clerk put the money in a brown paper sack which the respondent had given him. (TE II, 16, 20, 22). He said Williams also got some money after the clerk was shot and then

walked away from the scene. (TE II, 17, 22). The respondent said he learned what happened to the clerk from reading the newspaper. (TE II, 19-20).

The respondent said he noticed that a half-pint of liquor was on the counter at the time of the robbery. (TE II, 22-24). He also said the robbery occurred in the afternoon between 4:00 p.m. and 5:00 p.m. (TE II, 24) and that the weapon he used was a .357 caliber pistol. (TE II, 16, 24-29).

However, the police investigation of the case showed that the robbery occurred between 10:30 and 10:40 p.m. on August 7, 1981. No money was taken during the robbery and the liquor store clerk was killed by a .32 caliber bullet rather than a .357 caliber bullet. (TE II, 31-33). There was no alarm or siren system in the store. (TE II, 35). Detectives Burbrink and Branham testified that after the tape recorded statement was concluded, the respondent was taken to the bathroom at which time he disclosed that the weapon he used on the night of the Keg Liquor Store incident was actually a .32 caliber revolver. (TE II, 30, 45-46).

Based on the respondent's statement, the police arrested George Howard Williams.<sup>2</sup> He also gave a tape recorded statement

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<sup>2</sup>Williams received a twenty (20) year sentence in connection with the robbery at the liquor store. (TE III, 47, 51-53).

which was played at trial. (TE IV, 8-19).<sup>3</sup> Williams denied any wrongdoing and said he was purchasing a half-pint of T.W. Samuels whiskey when the respondent, carrying a gun, entered the liquor store and announced a robbery. He said the clerk turned to go into the back of the store when the respondent fired a shot. Williams identified the weapon as a .32 caliber revolver, and said the respondent was 16 years old at the time of the robbery. (TE IV, 9-11, 13, 18). Williams said he left his purchase on the counter when he fled the store and that the respondent got into his [Williams'] car and they drove to Williams' house. (TE IV, 10-11, 16, 18). He denied knowing that the respondent was going to commit the robbery. (TE IV, 15-16, 18].<sup>4</sup>

The police also obtained an out-of-court statement from the respondent's mother, Geraldine Crane. She spoke to Detective Tangel the day after the respondent was arrested but at trial she could not remember what she told the police. (TE IV, 56-67). Tangel testified that Lt. Spellman asked Ms. Crane, "what did [Major Crane] say happened?" According to Tangel, Ms. Crane responded, "Major Crane just said that he robbed, he killed, he shot a man, but he didn't know the man was dead until [the day he

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<sup>3</sup>Williams' statement, being that of a convicted felon, suffers from an inherent credibility impairment. Commonwealth v. Richardson, Ky., 674 S.W.2d 515 (1984). Moreover, Williams was motivated to minimize his culpability, otherwise he would have been charged as the triggerman in the crime.

<sup>4</sup>Williams also said that the respondent arrived at the liquor store in a car driven by A.D. Hardy who apparently drove away after the shooting as Williams left the store. (TE IV, 10-11).

was arrested]. (TE IV, 62). The respondent apparently provided no other details or specific information about the incident.<sup>5</sup>

The respondent did not testify at trial and both Williams and Ms. Crane denied knowing anything about the robbery or the respondent's part in it. (TE III, 15, 43; TE IV, 55). There were no disinterested witnesses to the shooting at the liquor store so the statements of the respondent, his mother and Williams constitute the only direct evidence connecting the respondent with the crime.<sup>6</sup>

Defense counsel filed a pretrial motion to suppress the respondent's confession to the police. (TR 36-39). At a hearing conducted on the motion, evidence was introduced that the petitioner, who was 16 years old at the time of the crime, functioned at the level of a third or fourth grade child. (TE Supp. 36-38). Evidence was also introduced that he confessed to two other crimes, a shooting and a robbery, that he did not commit. (TE Supp. 11, 14, 18-19). Finding that the respondent's confession was made voluntarily, the trial court denied the motion to suppress. (TR 66-67; TE Supp. 73-76).

Before any evidence was presented at trial, the prosecutor moved in limine to prevent introduction of evidence

<sup>5</sup> Ms. Crane's statement was of little or no probative value because it was vague and not articulate any specific details of the crime. Moreover, the trustworthiness of any statement that the respondent might have made to his mother is in serious doubt because it was shown that he had a propensity to confess to crimes that he had not committed. (TE Supp. 9-10, 14, 18-19).

<sup>6</sup> Patrick Holder was called to testify about what the respondent had told him concerning the robbery. However, Holder did not know when the respondent had spoken to him and did not know the exact incident to which the respondent was referring. (TE II, 59-60).

concerning the taking of the confession. (TE II, 3). He argued that evidence surrounding the circumstances under which the confession was obtained would amount to an attack on the voluntariness of the confession which had been conclusively determined at the suppression hearing. (TE II, 3). Defense counsel responded that the circumstances surrounding the taking of the confession were to be used to challenge the credibility of the confession, not its voluntariness. (TE II, 4). The trial court ruled that defense counsel could not ask specific questions as to the length of time of the interrogation or the fact that the respondent was alone with police officers during the interrogation. (TE II, 4-7).

At trial, the defense was allowed to introduce into evidence certain facts contained within the confession that were not substantiated by the police investigation of the crime. This evidence included: a misdescription of the weapon used in the shooting (TE II, 16, 24-28, 30-31, 36-37); no money was taken from the liquor store (TE II, 16-17, 21-22, 33, 39; TE IV, 53-54); the store had no siren or alarm system (TE II, 16, 35, 39); a significant discrepancy in the time the crime was committed (TE II 24, 31); and "a gun being fired which had not been fired." Crane v. Commonwealth, Ky., 690 S.W.2d 753, 755 (1985). (TE II, 16, 27, 39). The defense also presented evidence that two people saw a white male with blonde hair run from the direction of the liquor store close to the time the police were responding to the scene. The man got into a car and, while driving away, discarded a beer bottle which was retrieved by the police. (TE V, 3-7, 9-12).

The defense did not present testimony at trial concerning the circumstances surrounding procurement of the confession but did preserve that evidence by way of avowal<sup>7</sup> which established that the respondent, who was 16 years old at the time, was kept in a small, windowless 10 x 12 foot room from shortly after 7:00 p.m. until approximately 8:40 p.m. During that time he was alone in the room with several police officers who were conducting the interrogation. (TE Supp. 36-37; TE V, 14-25).

On direct appeal, the Kentucky Supreme Court ruled that excluding evidence of the circumstances under which the respondent's confession was obtained to demonstrate its lack of credibility did not constitute error. Crane v. Commonwealth, Ky., 690 S.W.2d 753 (1985). Recognizing that the exclusion of such evidence violated the right to present a defense under the 6th and 14th Amendments, this Court reversed and remanded the case to the Kentucky Supreme Court to consider whether the error was harmless. Crane v. Kentucky, 476 U.S. 683 (1986).

On remand, the Kentucky Supreme Court, by a four to two margin, found the constitutional error to be harmless beyond a reasonable doubt. Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987). That Court summarized the excluded evidence as follows:

The excluded evidence would have added this additional information from Detectives Burbrink and Branham: that [respondent] was arrested at 5:50 p.m. and remained at the police substation until 6:25 p.m., just long enough to type up some

<sup>7</sup>An avowal is a procedure authorized by Kentucky Rule of Criminal Procedure (RCr) 9.52 which allows a party to place in the record evidence deemed inadmissible by the trial court. The evidence is presented outside the presence of the jury and an appellate court is thereby able to review the trial court's ruling excluding the evidence.

papers; that [respondent] was then transported to the youth bureau in Louisville police headquarters arriving there at 6:38 p.m.; that at 6:59 p.m. he was taken to the detention center where he was met by county officers; that he was questioned in an office approximately 10' x 10' or 12' x 12' square at the detention center until approximately 7:50 p.m., when a recorded statement was taken which ended at 8:40 p.m.; that no member of his family was present, but officers repeatedly attempted to get in contact with his mother and did get in touch with his aunt and requested the family to come to the detention center; that nobody entered the office when [respondent] was questioned except four or five officers; that one of the officers was in and out of the room getting soft drinks and potato chips for [respondent]; that [respondent] was seated during the questioning; that he appeared calm; that the questioning was a conversational-type situation; and that [respondent] was treated well.

Id. 726 S.W.2d at 307.

When his conviction was affirmed a second time by the Kentucky Supreme Court, the respondent filed a petition for a writ of certiorari which was denied. Crane v. Kentucky, 484 U.S. 834 (1987). The respondent then sought federal habeas corpus relief.

Finding that the constitutional error was not harmless beyond a reasonable doubt, the United States District Court for the Western District of Kentucky granted the respondent's petition for a writ of habeas corpus. Crane v. Sowders, 708 F.Supp. 163 (W.D. Ky. 1989). Following an appeal by the Commonwealth of Kentucky, the judgment of the District Court was affirmed in a unanimous opinion by the United States Court of Appeals for the Sixth Circuit on November 14, 1989. Crane v. Sowders, \_\_\_\_ F.2d \_\_\_\_ (6th Cir. 1989).

ARGUMENT

The respondent respectfully submits that certiorari should be denied because the petitioners have failed to establish that this case presents any constitutional issue substantial enough to warrant review by the Court. The harmless error analysis undertaken by the United States District Court for the Western District of Kentucky and United States Court of Appeals for the Sixth Circuit fully complies with all constitutional precedent and does not conflict with any decision of this Court. No issue of national importance is at stake here. The decisions of the lower federal courts are specific to the respondent's case and will affect few, if any, other litigants. The petitioners are simply trying to create a constitutional issue where none exists.

This case involves nothing more than application of the harmless error standard to constitutional errors. The fact of the matter is that the Kentucky Supreme Court, following remand from this Court, applied an erroneous harmless error standard. Citing Commonwealth v. McIntosh, Ky., 646 S.W.2d 43 (1983), the Kentucky Supreme Court stated, "The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different." Crane v. Commonwealth, Ky., 726 S.W.2d 302, 307 (1987). In McIntosh, the Kentucky Supreme Court held, "The doctrine of nonprejudicial error, sometimes called 'harmless error', is that in determining whether an error is prejudicial, an appellate court must consider whether on the whole case there is a substantial possibility that the result would have been any different." Id. 646 S.W.2d at 45. The

foregoing language from McIntosh and the decision of the Kentucky Supreme Court, following remand from this Court, clearly indicate that the harmless error standard it applied to the respondent's case is a "result-oriented" or an "outcome determinative" test which was specifically condemned in Delaware v. Van Arsdall, 475 U.S. 673, 679-680 (1986). An outcome determinative test requires a showing that the error "more likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). As noted in Van Arsdall, 475 U.S. at 679-680, Chapman v. California, 386 U.S. 18 (1967) enunciates the proper test by which to determine whether constitutional error is harmless. Chapman does not require a finding of a "substantial possibility that the result would have been any different" as do the Kentucky Supreme Court decisions in the case at bar (Crane, 726 S.W.2d at 307) and McIntosh, 646 S.W.2d at 45. Chapman simply requires a showing of a "reasonable possibility that the evidence complained of might have contributed to the conviction. Id. 386 U.S. at 23 quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24. "[H]arm is presumed to have flowed from constitutional error; the burden is on the State to demonstrate conclusively to the contrary." Eberhardt v. Bordenkircher, 605 F.2d 275, 279 (6th Cir. 1979).

The Court in Chapman expressed a preference for the standard articulated in Fahy to determine harmless error over an approach which relies on the amount of evidence against the

accused. Chapman, 386 U.S. at 23. The crucial factor in harmless error analysis is "what effect the error had or reasonably may be taken to have had upon the jury's decision." Kotteakos v. United States, 328 U.S. 750, 763-764 (1946). Nothing asserted by the petitioners in their certiorari petition supports the conclusion that the United States District Court and the United States Court of Appeals failed to correctly follow and apply this Court's precedent in determining whether the constitutional error recognized by this Court was harmless beyond a reasonable doubt. Crane v. Kentucky, 476 U.S. at 691. Therefore, the petitioners have not provided this Court with any reason to grant certiorari.

The thrust of the petitioners' argument is that the right to present a defense, guaranteed by the 6th and 14th Amendments, was fully satisfied because defense counsel was able to establish that the respondent's confession was factually inaccurate with much of the evidence discovered by the police during their investigation of this case. What the petitioners ignore is the fact that the state trial court's ruling denied the respondent "a meaningful opportunity to present a complete defense"<sup>8</sup> because that ruling deprived him of a chance to fully challenge the reliability and credibility of the most damaging piece of evidence against him, i.e. his confession. Crane v. Kentucky, 476 U.S. at 691. As this Court recognized, the respondent's "entire defense was that there was no physical evidence to link him to the crime and that, for variety of

<sup>8</sup> California v. Trombettta, 467 U.S. 479, 485 (1984).

reasons, his earlier admission of guilt was not to be believed." Id. That objective cannot be attained where the respondent was limited to demonstrating the factual inaccuracies of the confession with the evidence discovered by the police. This Court unequivocally recognized the unconstitutional restraints placed on the respondent's right to present a defense. "[S]tripped of the power to describe to the jury the circumstances that prompted his confession, the [respondent] is effectively disabled from answering the one question every rational juror needs answered: if the [respondent] is innocent, why did he previously admit his guilt?" Id. 476 U.S. at 689. The exclusion of the evidence sought to be presented by the defense left the question unanswered and undoubtedly created the possibility that the constitutional error contributed to the respondent's conviction.

The petitioners state that the Sixth Circuit "focused primarily upon the question whether the evidence other than the confession was sufficient to sustain [the respondent's] conviction rather than upon the specific facts [the respondent] proffered for admission which were excluded from the jury by the trial court." (Pet. for Cert. p. 15). Yet, the petitioners made no complaint when the Kentucky Supreme Court undertook precisely the same analysis in determining whether the constitutional error was harmless. See Crane v. Commonwealth, 726 S.W.2d at 307. Thus, it is readily apparent that it is not the analysis of the lower federal courts with which the petitioners take issue but rather the result they reached. Dissatisfaction with the result reached by a lower court is not an appropriate basis upon which to grant

certiorari. There is no doubt that the respondent's confession was the most damaging piece of evidence against him. That fact has been previously acknowledged by this Court (Crane v. Kentucky, 476 U.S. at 691), and was also recognized by the District Court (Crane v. Sowders, 708 F. Supp. at 166) and the Sixth Circuit (Crane v. Sowders, \_\_\_\_ F.2d at \_\_\_\_; Slip Op. at 6). Indeed, the petitioners conceded that point not only in oral argument before the Sixth Circuit (Crane v. Sowders, \_\_\_\_ F.2d at \_\_\_\_; Slip Op. at 6) but also acknowledged in their Sixth Circuit brief that the confession was the "linchpin" of the case. (Brief Filed on Behalf of Dewey Sowders, Respondent-Appellant, 6th Cir. No. 89-5289, p. 15). Yet, the petitioners seem to insist that only limited facts should be considered in determining whether a constitutional error is harmless. Such an argument contravenes the fundamental principle that harmless error is determined by an examination of "the whole record". Delaware v. Van Arsdall, 475 U.S. at 681. It is readily apparent that the harmless error analysis undertaken by the District Court and the Court of Appeals fully complied with the decisions of this Court.

The petitioners complain that the District Court and the Court of Appeals unjustifiably rejected the fact-finding conducted by the Kentucky Supreme Court. (Pet. for Cert. 15-16). Those courts simply undertook, and correctly performed, a determination of whether constitutional error was harmless. Moreover, this argument was never presented to those lower federal courts and should not now be considered by this Court.

The petitioners' reliance on Delaware v. Van Arsdall, supra and Dorsey v. Parke, 872 F.2d 163 (6th Cir. 1989) is misplaced because those cases are factually distinguishable from this case. In Dorsey and Van Arsdall, only a partial limitation of the right to cross-examine was imposed on the defense. In contrast, the respondent here was completely barred from cross-examining witnesses and giving a closing argument on the circumstances under which his statement was given to the police. As this Court noted, "at trial, defense counsel sought to introduce testimony about the physical and psychological environment in which the confession was obtained. His objective in so doing was to suggest that the statement was unworthy of belief." Crane v. Kentucky, 476 U.S. at 684. "We do . . . think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of [that defense] succeeding." Id. at 691. Here, the respondent had no opportunity to present crucial aspects of his defense.

The petitioners conclude that the respondent's right to present a defense was fully satisfied because defense counsel was able, in her opening statement, to make reference to evidence that was ultimately excluded by the trial court's ruling and because defense counsel, during closing argument, discussed the inaccuracies contained in the respondent's confession. (Pet. for Cert., pp. 14-15, 22). The petitioners' argument ignores the fact that opening statements and closing arguments are not evidence (as the trial judge informed the jury, TE I, 5-6). See also Crane v. Kentucky, 476 U.S. at 685. Moreover, the trial court's ruling put

the defense in a completely untenable position because defense counsel did not introduce proof to support the claim that the confession was untrustworthy. The exclusion of evidence so crucial to the defense's theory of the case undoubtedly created a reasonable possibility that the constitutional error contributed to the conviction because the jury was given no reason to question the reliability or credibility of the respondent's confession. The exclusion of that evidence stripped the respondent of the ability to explain why he gave the confession.

The petitioners' argument is, in essence, that if the jury heard the excluded evidence from any source, then there is no constitutional error. Where, as here, evidence favorable to the defense may only be incidentally or tangentially disclosed in the course of presenting proof, it can only be surmised what, if anything, the jury might have inferred from all that was said and done in the courtroom. That anomalous situation hardly squares with the right to present a defense which requires that counsel be allowed to shape, mold and present the evidence in such a way that the jury can apply it to the theory of the defense. This is the essence of the adversarial system which ensures that trial by jury is truly a search for the truth. The right to fully present a defense thus advances the reliability of the verdict and thereby engenders confidence in the fundamental fairness of our legal system.

The right to confront and cross-examine witnesses as well as the right to present a closing argument [Herring v. New York, 422 U.S. 853 (1975)] are essential components of the right

to present a defense. Here, the respondent was prevented from cross-examining police officers about the circumstances under which the confession was obtained and was also denied the opportunity of arguing to the jury that such evidence and the reasonable inferences therefrom supported his theory that the confession was untrustworthy. Although defense counsel was permitted to establish factual inaccuracies contained in the confession, that conveyed only a part of the defense to the jury. Unable to present his entire defense, the respondent was forced to content himself with the hope that the jury would not only construct the remainder of his defense from what it had heard in the courtroom but also draw the correct inferences therefrom. The right to present a defense cannot be relegated to a game of chance in which the defendant must hope that the evidence in support of his case is properly considered by the jury.

In terms of harmless error analysis, the question must be asked, "Is there a reasonable possibility that the exclusion of evidence surrounding the circumstances under which the respondent's confession was obtained might have contributed to his conviction?" That question must be answered affirmatively. The respondent's confession was the most damaging piece of evidence against him. As defense counsel's opening statement indicated, the defense intended to offer proof concerning the circumstances under which the confession was obtained in order to demonstrate its untrustworthiness. The exclusion of that evidence left the jury with the naked fact that the respondent admitted that he committed the crime with which he was charged. The state trial court's

ruling left the respondent without the opportunity to explain or offer evidence as to why he gave that confession. The District Court and the Court of Appeals correctly concluded that the substantial infringement on the respondent's right to present a defense and his right to fully confront and cross-examine witnesses prevented the constitutional error committed in this case from being harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the respondent, Major Crane, by counsel, respectfully urges the Court to deny the Petition for Writ of Certiorari.

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